Supreme Court, U.S.
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No. 99-1125

In The

Supreme Court of the United States

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, INC.,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS DREISESZUN, OZAR, AND THE ESTATE OF FRANK S. MORGAN

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QUESTION PRESENTED

Did the court of appeals err in holding that the district court did not abuse its discretion in declining to reopen a final judgment, based on the unique facts and procedural posture of the case?

LIST OF PARTIES

Petitioner is the Kansas Public Employees Retirement System, Inc. (KPERS), the plaintiff and appellant below.

Respondents on this brief are Thomas S. and Marilyn J. Morgan, co-executors of the Estate of Frank S. Morgan; Sherman Dreiseszun; and I.I. Ozar, all defendants and appellees below.

Other respondents are KPMG Peat Marwick and Robert W.L. Spence; Shook, Hardy & Bacon, P.C., C. Patrick McLarney, and Frank Sebree; Blackwell Sanders Peper Martin, L.L.P. and William H. Sanders, Sr.; and Reimer & Koger Associates, Inc., Ken Koger, Ron Reimer, Clifford Shinski, Brent Messick, and Robert Crew.

In addition, the Resolution Trust Corporation (RTC) was a party to this case in earlier proceedings, and Michael Russell remains a defendant in the district court.

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BRIEF IN OPPOSITION FOR RESPONDENTS DREISESZUN, OZAR, AND ESTATE OF FRANK S. MORGAN

Respondents Dreiseszun, Ozar, and the Estate of Frank S. Morgan respectfully request that the Court deny the Petition for a Writ of Certiorari seeking review of the court of appeals' most recent decision in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 194 F.3d 922 (8th Cir. 1999) (*"KPERS IX"*), and is included in the Appendix to the Petition at App. 1a-6a.[1] The order of the district court denying relief from the judgment is unreported and is included in the Appendix to the Petition at 7a-11a. Previous opinions of the court of appeals in this case are reported: *KPERS v. Reimer & Koger Assocs., Inc.* (*"KPERS I"*), 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994); *KPERS v. Reimer & Koger Assocs., Inc.* (*"KPERS II"*), 60 F.3d 1304 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc.* (*"KPERS III"*), 61 F.3d 608 (8th Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996); *KPERS v. Reimer & Koger Assocs., Inc.* (*"KPERS IV"*), 77 F.3d 1063 (8th Cir.), *cert. denied*, 519 U.S. 948 (1996); *In re KPERS* (*"KPERS V"*), 85 F.3d 1353 (8th Cir. 1996); *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.* (*"KPERS VI"*), 114 F.3d 679 (8th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998); *KPERS v. Russell* (*"KPERS VII"*), 140 F.3d

[1] References to the Appendix to the Petition are "App. ___a."

748 (8th Cir. 1998); *KPERS v. Reimer & Koger Assocs.* (*"KPERS VIII"*), 165 F.3d 627 (8th Cir. 1999).

STATEMENT OF THE CASE

This case is over eight years old and has been heard by the Eighth Circuit on at least ten separate occasions. This Court has refused to review the case on four prior occasions. In 1996, the district court granted summary judgment for respondents and others on the basis that the claims of plaintiff-petitioner Kansas Public Employees Retirement System, Inc. (KPERS) were time-barred. The court of appeals affirmed the summary judgments, denied KPERS's petition for rehearing or rehearing en banc, and issued its mandate, making the case final. The Kansas Supreme Court later issued an opinion in unrelated cases brought by KPERS concerning wholly different KPERS investments, by which the Kansas court disagreed with the court of appeals' interpretation of Kansas limitations law. Subsequently, in this action, on the basis of the new Kansas Supreme Court decision, KPERS filed a motion for leave to file a second petition for rehearing or alternatively for recall of the mandate. The court of appeals denied that motion. KPERS also addressed the Kansas decision in its petition to this Court for a writ of certiorari and its later motion to this Court for leave to file a petition for rehearing, but the Court denied relief both times.

KPERS then filed a motion in the district court for relief from the summary judgments under Fed. R. Civ. P.

60(b)(6) on the basis of the Kansas Supreme Court decision, but the district court denied the motion. The court of appeals affirmed, holding that the district court did not abuse its broad discretion in following the established rule that an intervening change in state decisional law is not a proper basis for relief under Rule 60(b)(6) and in finding that, under the unique circumstances of this case, the equities did not weigh in favor of granting KPERS the equitable relief it sought. KPERS now seeks review in this Court of that decision by the court of appeals.

A. Factual and Procedural Background

The history of this protracted dispute is ably told by the court of appeals in the numerous reported opinions in this case. *See also* Brief of Respondents Dreiseszun, Ozar, and the Estate of Frank S. Morgan in Opposition to Petition for Writ of Certiorari, *KPERS v. Blackwell Sanders Matheny Weary & Lombardi, L.C.*, No. 97-471 (U.S.), at 3-9. Accordingly, only a brief summary of the relevant facts follows.

In this lawsuit, plaintiff KPERS brought claims against defendant-respondents Estate of Frank Morgan, Sherman Dreiseszun, and I.I. Ozar (the HSA defendants) and other defendants relating to KPERS's 1986 investment in high-yield, high-risk debt securities issued by Home Savings Association (HSA), a savings and loan association located in Kansas City, Missouri. The HSA defendants were members of the HSA board of directors. In 1991, KPERS filed suit against the HSA defendants and others in Kansas state court, alleging various causes of action in connection with the HSA investment. The HSA

defendants impleaded the Resolution Trust Corporation (RTC), the receiver for HSA, and the RTC removed the case to the United States District Court for the Western District of Missouri, as authorized by 12 U.S.C. § 1441(*l*). KPERS then obtained an *ex parte* order from the state court judge severing the claims against the RTC, in an effort to defeat removal of the entire case from the state court.[2] The district court subsequently denied KPERS's motion to remand the case to state court, and the court of appeals affirmed, holding that the *ex parte* severance order obtained by KPERS was unconstitutional, and that federal jurisdiction over the entire action was proper. *See KPERS I*, 4 F.3d at 616-22.[3] The RTC was eventually dismissed, and KPERS again moved to remand the case to state court, but the district court denied the motion. *See KPERS IV*, 77 F.3d at 1066.[4]

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[2] Kansas state court judges, as employees of the State of Kansas, are beneficiaries of KPERS.

[3] Thus, the claims against the RTC had not been "properly severed", as KPERS still suggests. *See* KPERS's Petition for a Writ of Certiorari at 6 n.4.

[4] In its Petition, KPERS has attempted to create the impression that the federal courts' jurisdiction over this case resulted from improper conduct by defendants and even the courts. *See* KPERS's Petition for a Writ of Certiorari at 2 (referring to defendants' "manipulative forum-shopping efforts"), 15 (referring to defendants' "engineering of the removal of this case"), 18 n.10 (referring to defendants' "manipulative motion practice"), 19 (same), 23 (referring to the "jurisdictional monopoly seized by the federal courts"). To the contrary, the RTC properly removed this action pursuant to statute, the district court properly assumed and maintained jurisdiction over the action, and the court of appeals properly affirmed the assumption of that jurisdiction. As demonstrated

Defendants moved for summary judgment, arguing that KPERS's claims were time-barred, but the district court denied the motions, concluding that KPERS's actions were timely under a new ten-year Kansas statute of limitations that was specifically enacted for KPERS. In *KPERS III*, the court of appeals reversed that decision. The court of appeals held that the limitations law of Missouri, the forum state, governed the action, and that Missouri's five-year statute would apply unless, under Missouri's borrowing statute, the actions would be barred by a shorter Kansas statute. *KPERS III*, 61 F.3d at 614. The court of appeals further held that the new specially-enacted Kansas ten-year statute did not contain sufficient language under established Kansas law to revive already-barred actions and thus did not apply in the present case. *Id.* at 615. The court of appeals therefore did not reach (and has never reached) the "troublesome" question of whether application of the ten-year statute would violate the Equal Protection Clause, and it remanded the case for the district court to determine whether KPERS's claims were time-barred under the

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in this Statement of the Case, KPERS continually flouted the federal courts' jurisdiction by engaging in unreasonable, vexatious, and bad faith conduct.

KPERS also defends its actions by arguing that defendants had contracted with a Kansas state agency and thus were "on notice" that they may face litigation in Kansas. *See* KPERS's Petition for a Writ of Certiorari at 21. In the same way, however, KPERS knowingly invested in a federally-insured savings and loan located in Missouri, and thus it was "on notice" and assumed the risk that any resulting litigation may take place in federal court in Missouri.

applicable two- and three-year Kansas statutes of limitations. *Id.* at 616. In *KPERS III*, KPERS did not challenge the district court's holding that KPERS was subject to limitations defenses because its investment activities were proprietary and not governmental in nature, *see id.* at 611-16, and thus KPERS may be said to have waived its argument on that issue.

Within a month of the court of appeals' decision in *KPERS III*, KPERS filed two state court actions against various of the defendants (not the HSA defendants) for damages arising out of the HSA investment. In one of the actions, defendants impleaded the RTC, who again removed the case to federal court. The federal district court then granted an injunction against KPERS's prosecution of the two new suits, noting that KPERS had filed the cases in an attempt "to obtain Kansas courts' more favorable rulings on the statute of limitations issue decided by the 8th Circuit Court of Appeals and also to escape a multitude of problems and issues that are causing delays in federal court." *KPERS IV*, 77 F.3d at 1067. The court of appeals upheld the injunction. *Id.* at 1067-71. The district court later awarded attorney fees and costs as a sanction against KPERS. *See KPERS VIII*, 165 F.3d at 629. The district court found that KPERS had acted "with objectively unreasonable behavior and bad faith" when it filed the parallel actions in state court. *Id.* The district court further found as follows:

> Furthermore, by filing the Kansas case, KPERS unreasonably and vexatiously delayed the processing of this case. Filing the Kansas case distracted both the other parties in this case and the court from our efforts to resolve the

> issues in this case in an efficient and expeditious manner. In addition, by filing a parallel suit in Kansas state court, KPERS multiplied the proceedings for [defendants] thereby unreasonably increasing the expense of the defense of this case.

Id. at 630. On appeal once again, the court of appeals affirmed the award of fees and costs, rejecting KPERS's arguments "that the attorneys' fees and costs were not substantially justified on the facts, and that its acts were not objectively unreasonable or in bad faith." *Id.*

KPERS's next move was its attempt to disqualify the presiding district court judge, who, by this time, had spent more time on this case than he had spent on any other case save one in the last ten years. *KPERS V*, 85 F.3d at 1355 n.3. In upholding the district court's denial of KPERS's disqualification motions, the court of appeals specifically noted KPERS's abusive litigation tactics:

> After our ruling that the ten-year Kansas statute of limitations does not apply to this case, KPERS undertook a flurry of actions which occupied the district court's time to the detriment of the efficient resolution of this case. As noted above, it filed a motion to have the court reconsider its April 1994 ruling regarding KPERS's proprietary capacity, it filed duplicative suits in Kansas state court necessitating the issuance of preliminary injunctions against it, and it filed a third motion to remand the case to Kansas state court. In his order of October 25, 1995, on the renewed motion to remand, the district judge noted that "since the Eighth Circuit Court of Appeals' decision on July 27, 1995, KPERS has taken a number of steps, including

> the filing of this motion, to delay the expeditious resolution of this case." When we affirmed the temporary injunctions prohibiting KPERS from pursuing the duplicative state court suits it filed after our July 27, 1995, statute of limitations decision, we noted that KPERS's purpose in filing the duplicative state suits was to obtain a favorable decision in the Kansas courts on the same statute of limitations issue we had already decided. We found the district court's finding that, by filing the duplicative state suits, KPERS had merely tried to " 'carve up what was one case into separate cases with separate claims, all leading to a subversion of the RTC's right to remove the entire case' " to be fully supported by the record and not clearly erroneous.

Id. at 1359 (citations omitted). The court of appeals further stated that its review of "KPERS' pattern of conduct" led it to conclude that "KPERS' recusal motion and this petition [for mandamus] were filed for tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge." *Id.* at 1360.

On the basis of the remand ordered in *KPERS III*, defendants again moved for summary judgment. By two orders issued June 3, 1996 and July 25, 1996, the district court awarded summary judgment to all remaining defendants except Michael Russell, KPERS's former chairman, who had not retained counsel, on the basis that KPERS's claims were barred by Kansas's two- and three-year statutes of limitation. KPERS consented to certification of the summary judgment orders for immediate appeal under Fed. R. Civ. P. 54(b). In *KPERS VI*, the court of appeals agreed that the claims were time-barred under

those statutes and affirmed the summary judgments. *KPERS VI*, 114 F.3d at 688-92. The court of appeals also rejected the argument that KPERS had waived in *KPERS III*, namely that it was not subject to any statute of limitations because its investment function was governmental and not proprietary. Instead, the court of appeals held that the applicability of the Kansas two- and three-year statutes was the law of the case, although the court addressed (and rejected) this argument by KPERS only for the purpose of determining that recognition of the law of the case doctrine would not work a manifest injustice in this case. *Id.* at 687-88. On June 12, 1997, the court of appeals denied KPERS's petition for rehearing or rehearing en banc, and the court issued its mandate on June 20, 1997.

On June 27, 1997, the Kansas Supreme Court issued its opinion in *KPERS v. Reimer & Koger Associates, Inc.*, 941 P.2d 1321 (Kan. 1997). In that case, to which the HSA defendants were not parties, and which involved entirely different investments by KPERS, the Kansas Supreme Court ruled that KPERS's investment activity had been governmental in nature and that general statutes of limitations therefore did not apply. *Id.* at 1343. The Kansas Supreme Court also disapproved the decision in *KPERS III*, and held that the new Kansas ten-year KPERS statute of limitations did in fact revive already-barred actions. *Id.* at 1347.[5]

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[5] In an apparent effort to rely on equitable considerations for its own benefit, KPERS states in its Petition that defendants' favorable outcome resulted from "the accident of a week's timing" between the state court opinion and the final decision of

KPERS then filed a motion in the court of appeals in *KPERS VI* for leave to file a second petition for rehearing or for recall of the mandate, in which it argued that the Kansas state case warranted reversal of the summary judgments against it, but the court of appeals denied the motion. KPERS filed a petition for a writ of certiorari in this Court, again arguing that the Kansas case required a different result in *KPERS VI*. *See* Petition for a Writ of Certiorari, *KPERS v. Blackwell Sanders Matheny Weary & Lombardi, L.C.*, No. 97-471 (U.S. Sept. 10, 1997). In that petition, KPERS made the same basic argument that it makes here in its present petition: That under principles of federalism, if a state is litigating its own claims under its own state law, then a state court decision rendered after the federal appeals court has issued its mandate should nevertheless control – particularly in the "extraordinary" circumstances in which the case was in federal court against KPERS's will and the court of appeals declined to further delay the case or to certify the controlling issue to the state court. *See id.* On January 12, 1998, this Court denied the petition for a writ of certiorari. 522 U.S. 1068 (1998) (also rejecting GVR relief based on the Kansas decision).

In the meantime, defendant Russell, acting pro se, moved for summary judgment, and on March 4, 1997, the

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the court of appeals, which KPERS argues was rendered on an accelerated basis. *See* KPERS's Petition for a Writ of Certiorari at 15, 2. As this Statement of the Case demonstrates, however, any such proximity in time resulted solely from KPERS's repeated tactics to delay the federal court proceedings, and there is no basis in the record to argue that the court of appeals "accelerated" its decision.

district court awarded him summary judgment on the same basis as for the other defendants. Russell did not participate in KPERS's subsequent appeal. On March 30, 1998, the court of appeals issued its opinion in *KPERS VII*. On the basis of the intervening Kansas state case, the court of appeals reversed the summary judgment in favor of Russell and held that the claims against him were timely under the Kansas ten-year statute. *KPERS VII*, 140 F.3d at 751-52. The court of appeals expressly stated two times, however, that *KPERS VI* had become "final". *Id.* at 751.

On April 20, 1998, KPERS filed in *KPERS VI* a motion in this Court for leave to file a petition for rehearing, in which it argued again that the Kansas state case warranted a different result in the present case. *See* Motion for Leave to File Petition for Rehearing Out of Time, *KPERS v. Blackwell Sanders Matheny Weary & Lombardi, L.C.*, No. 97-471 (U.S. Apr. 20, 1998). This Court again failed to find the circumstances so extraordinary as to warrant relief, and on May 18, 1998, it denied the motion. *See* Order, No. 97-471 (U.S. May 18, 1998).

B. Opinions of the District Court and Court of Appeals

On May 21, 1998, KPERS filed its motion in the district court for relief from the summary judgments under Fed. R. Civ. P. 60(b)(6). On August 21, 1998, the district court denied the motion. The district court concluded that KPERS had not shown "exceptional circumstances justifying extraordinary relief" under Rule 60(b). *See* App. 10a-11a. The district court, citing the court of appeals' decisions in *KPERS V* and *KPERS IV*, further

found that "[t]o the extent, if at all, that equitable considerations have an effect on Rule 60(b) relief, KPERS long ago abandoned any persuasive claim to equity." App. 11a. As an alternative basis for denying relief, the district court concluded that it was not authorized to grant the requested relief because the court of appeals and this Court had already refused to grant KPERS relief in the face of the very same arguments advanced by KPERS. *See* App. 9a-10a.

In *KPERS IX*, the Eighth Circuit, having gained through numerous prior appeals a thorough knowledge of all aspects of this litigation and its participants, affirmed the district court's order, holding that the district court had not abused its discretion in denying KPERS relief under Rule 60(b)(6). *See* App. 1a-6a, 194 F.3d 922. After reviewing the case's procedural history and noting the abuse-of-discretion standard of review, the court of appeals stated the general rule, gleaned from the caselaw of various courts of appeal, that a change in law is not an "extraordinary circumstance" that would permit relief from a final judgment under Rule 60(b)(6). *See* App. 2a-4a, 194 F.3d at 924-25. Again relying on caselaw from numerous federal circuits, the court of appeals stated the following basis for that general rule:

> Society's powerful countervailing interest in the finality of judgments simply requires that each case have an end, though the law continues to evolve. "The common law could not safely develop if the latest evolution in doctrine became the standard for measuring previously resolved claims." Moreover, there is nothing in the Erie doctrine that requires federal courts to sacrifice the finality of their judgments because

> state courts subsequently interpret state law differently than the federal courts have done.

App. 4a-5a, 194 F.3d at 925 (citations and footnote omitted).

The court of appeals then listed the five factors that, according to KPERS, nevertheless made the case extraordinary. *See* App. 5a, 194 F.3d at 925-26. The court concluded that, "[w]hile these factors have been considered relevant in other cases, they do not compel the conclusion that the district court abused its discretion in denying KPERS's motion" for relief under Rule 60(b)(6). App. 5a, 194 F.3d at 926.[6] The court of appeals further noted the district court's allusion to KPERS's course of conduct during the litigation of this case, and gave the following examples:

> Early in this case, KPERS obtained an ex parte severance from the Kansas state court in order to frustrate removal. KPERS later filed parallel state court actions which were meant to subvert

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[6] KPERS has mischaracterized the opinion of the court of appeals in this regard. The court of appeals did *not* state or imply that the five factors cited by KPERS *required* granting relief under Rule 60(b)(6) under the circumstances present in this case. *See* KPERS's Petition for a Writ of Certiorari at 16. Rather, the court of appeals merely noted that such factors have been considered relevant under the circumstances present in other cases. Accordingly, by taking into account equitable considerations, the district court and the court of appeals did not deny KPERS relief "to which it would otherwise be entitled," as KPERS repeatedly insists. *See id.* at 17, 20, 22, 23. In other places in its Petition, KPERS notes that those other cases merely "authorize" – as opposed to compel – making an exception to the general rule against relief. *See id.* at 3, 15.

> federal removal jurisdiction. The district court held the filing of those cases to be objectively unreasonable and done in bad faith, and we affirmed.

App. 6a, 194 F.3d at 926.[7] The court of appeals concluded that the district court had properly given weight to equitable considerations in exercising its discretion under Rule 60(b) and declining to reopen the case. *Id.* Accordingly, the court of appeals found no abuse of discretion in the district court's denial of relief under the particular factual circumstances of this case. *Id.*[8]

REASONS FOR DENYING THE PETITION

This case is over. A final decision has been rendered and affirmed on appeal, and both this Court and the court of appeals have already refused on numerous occasions to undo that decision in the face of the same arguments, based on the same intervening state court case, as those advanced by KPERS here. In the face of those decisions, KPERS comes before this Court once again, arguing in essence that defendants and the lower courts

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[7] Thus, the court of appeals did not deny KPERS relief because it pursued efforts to keep the case in state court, *see* KPERS's Petition for a Writ of Certiorari at 3, 16; rather, the court of appeals cited some of the unreasonable, vexatious, bad faith tactics used by KPERS in that pursuit.

[8] The court of appeals did not address the district court's denial of relief under Rule 60(b)(6) on the alternative basis that it lacked authority to reopen the judgments for the reason that KPERS had already made the same arguments to the court of appeals and this Court.

have conspired to cheat KPERS of its claims. In fact, KPERS now challenges a discretionary ruling by the district court, by which the court refused, under the particular facts of this case, to depart from the general rule and grant rare and extraordinary relief from a final judgment. The court of appeals found that the district court did not abuse its broad discretion in so ruling. This Court should not disturb those rulings. Moreover, the decision of the court of appeals, which is based on particular facts and a unique procedural posture, not likely duplicated, does not depart from the decisions of this Court or any other court of appeals and is not worthy of discretionary review by this Court.[9]

Fed. R. Civ. P. 60(b)(6) allows a district court to relieve a party from a final judgment only in "extraordinary circumstances". *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1987) (citing *Ackermann v. United States*, 340 U.S. 193 (1950)). The important policy favoring finality of litigation mandates the rule, recognized by this Court and followed by every court of appeals that has considered the question, that an intervening change in decisional law does not constitute extraordinary circumstances and is not a proper basis for relief from a final judgment under Rule 60(b)(6). *See Agostini v. Felton*, 521 U.S. 203, 239 (1997); *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir. 1997); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-73 (2d Cir. 1994); *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) (per curiam); *Dowell v. State Farm Fire & Casualty Auto. Ins. Co.*, 993 F.2d 46, 48

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[9] The unique procedural aspect of this case is due in part to the involvement of the RTC, which no longer exists.

(4th Cir. 1993); *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 159-60 (5th Cir. 1990); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-30 (7th Cir. 1997); *Carter v. Romines*, 593 F.2d 823, 824 (8th Cir. 1979); *Tomlin v. McDaniel*, 865 F.2d 209, 211 (9th Cir. 1989); *Collins v. City of Wichita, Kan.*, 254 F.2d 837, 839 (10th Cir. 1958); *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996); *see also Liljeberg*, 486 U.S. at 873 (Rehnquist, J., dissenting) (noting that a "very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved"). This general rule is even stricter in a federal case where, as here, state law provides the rule of decision. *See Cincinnati Ins. Co.*, 131 F.3d at 628-29; *McGeschick v. Choucair*, 72 F.3d 62, 64 (7th Cir. 1995); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 750 (5th Cir. 1995); *DeWeerth*, 38 F.3d at 1273-74. KPERS does not dispute these principles.

Contrary to KPERS's argument, the decisions of the district court and court of appeals did not necessarily depend upon an application of the "unclean hands" doctrine. In addition to citing an alternative basis for denying relief, the district court noted the absence of the required extraordinary circumstances before it separately found that KPERS had abandoned any claim to equity. Moreover, as explained above, the court of appeals did *not* conclude that the district court was compelled to grant KPERS relief but for the consideration of KPERS's abusive litigation tactics. Therefore, the very premise upon which KPERS's argument is founded is flawed.

At any rate, it is clear that equitable factors may be considered by the district court in ruling on a motion

under Rule 60(b)(6). This Court has noted that that provision may be used to vacate a judgment when "appropriate to accomplish justice." *Liljeberg*, 486 U.S. at 863 (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)). Certainly, the concept of justice encompasses a consideration of equity. *See, e.g., Woods v. Kenan*, 173 F.3d 770, 780 (10th Cir.) (Rule 60(b)(6) is a grand reservoir of equitable power), *cert. denied*, 120 S. Ct. 187 (1999); *Samaras v. America's Favorite Chicken Co.*, 153 F.3d 268, 272 (5th Cir. 1998) (considering whether relief under Rule 60(b)(6) would be equitable), *cert. denied*, 526 U.S. 1017 (1999); *National Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993) (Rule 60(b)(6) is a grand reservoir of equitable power); *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (relief under Rule 60(b)(6) requires "unusual and extreme situations where principles of equity mandate relief"); *Hugel v. McNell*, 886 F.2d 1, 6 (1st Cir. 1989) (Rule 60(b)(6) allows relief when equitable considerations so counsel); *Peacock v. Board of Sch. Comm'rs of Indianapolis*, 721 F.2d 210, 214 (7th Cir. 1983) (relief is permitted under Rule 60(b)(6) when equitable action is appropriate to accomplish justice).[10]

In particular, courts have applied the equitable doctrine of "unclean hands" in considering relief under Rule 60(b). *See, e.g., National Org. for Women v. Operation Rescue*, 47 F.3d 667, 669 (4th Cir. 1995) (per curiam) (affirming

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[10] In this sense, KPERS's attempt to create a departure from existing caselaw by arguing that the court of appeals failed to balance finality with justice is misguided. Certainly, in this case the district court and the court of appeals considered all circumstances present in the case in determining whether justice required relief from the judgments.

district court denial of Rule 60(b)(6) relief where defendants' dilatory tactics gave them unclean hands "making them undeserving of equitable relief"); *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 681 (11th Cir. 1984) ("[T]his case is replete with inexcusable delay and numerous unjustified violations of the court's orders, which fully support the court's denial of relief under Rule 60(b)(6)."); *Nalco Chem. Co. v. Hydro Technologies, Inc.*, 148 F.R.D. 608, 617 (E.D. Wis. 1993) (doctrine of unclean hands is an equitable defense to a claim seeking an equitable remedy such as relief under Rule 60(b)); *Sony Corp. v. S.W.I. Trading, Inc.*, 104 F.R.D. 535, 541 (S.D.N.Y. 1985) ("[D]efendant cannot avail himself of the equitable considerations governing the application of Fed. R. Civ. P. 60(b)(6) because of his unclean hands. . . . ").

KPERS has not cited any cases holding or even suggesting that equitable factors may not be considered by a court in determining whether extraordinary circumstances are present as required for relief under Rule 60(b)(6). Accordingly, the consideration by the court of appeals of equitable factors does not create a split in caselaw among the courts of appeals or represent a departure from existing law from this Court. *See* Sup. Ct. Rule 10.

The district court's decision here, by which it weighed the specific facts over the course of the entire, protracted litigation, is subject to an abuse-of-discretion standard of review. *See Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) (ruling on Rule 60(b) motion is reviewed for abuse of discretion); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233 (1995)

(Rule 60(b) allows for discretionary revision of judgments). As the court of appeals held, the district court did not abuse its discretion in this case by refusing to depart from the general rule that an intervening change in law is not a sufficient basis for relief from a judgment under Rule 60(b)(6). The overarching interest in the finality of judgments is further strengthened here by the abusive litigation tactics and continual flouting of federal jurisdiction by KPERS of which the district court and court of appeals were so well aware. Certainly, the district court was not *required* to grant relief, as KPERS must show here. *See, e.g., Cincinnati Ins. Co.*, 131 F.3d at 626-30 (denying Rule 60(b)(6) in case analogous to present case). Indeed, a conclusion that the district court was *compelled* to depart from the general rule would eviscerate the discretionary nature of the district court's decision under Rule 60(b)(6).

The essence of KPERS's argument here is that its conduct did not, as a matter of law, constitute "unclean hands". Such argument was most properly considered by the district court, to whom the appellate courts must defer on questions involving the weighing of specific facts.

KPERS also insists that, under principles of federalism, its status as a state agency attempting to negotiate its way to state court somehow exonerates it regarding its abusive litigation tactics and makes such actions irrelevant for purposes of its motion for equitable relief.[11]

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[11] KPERS did not argue in the district court or the court of appeals that its status as a state agency and its purpose in

KPERS has not cited any authority, however, in support of the proposition that an instrument of the state may litigate in any manner it chooses and is immune from the adverse consequences of bad faith conduct that would attend any other litigant. Nor has KPERS offered any support for its argument that the ends may justify the means for purposes of Rule 60(b)(6) consideration.[12] Thus, once again the decision of the court of appeals does not conflict with established principles of law or a decision of this Court or any court of appeals. *See* Sup. Ct. Rule 10.

Finally, this Court has already heard the same arguments by KPERS and has nonetheless refused to find the circumstances so extraordinary as to warrant relief from the summary judgments. That fact further weighed against KPERS in seeking equitable relief, and in fact casts doubt on the availability of relief under Rule 60 in this case. *See Seese*, 679 F.2d at 337 (holding that the district court was without jurisdiction to alter the mandate of the court of appeals on the basis of a matter included or includable in the prior appeal).

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seeking to obtain a ruling in state court provided a basis for relief under Rule 60(b)(6), or precluded consideration of equitable factors. Instead, KPERS's federalism argument below was based solely on the fact that KPERS had not chosen the federal forum. Accordingly, KPERS may not now raise this argument for the first time in this context.

[12] In addition, KPERS's argument is outweighed by the principle of federalism that strengthens the general rule against Rule 60(b)(6) relief on the basis of an intervening change in law in federal cases controlled by state law.

As discussed above, KPERS has essentially argued its position on the merits of its case, i.e., that it was entitled to relief under Rule 60(b)(6). The merits alone are not sufficient, however, to warrant the granting of KPERS's petition. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (Court's review is discretionary and depends on factors *other than* the perceived correctness of the underlying judgment). This case simply does not meet the standards for discretionary review by this Court. As noted above, the decision of the court of appeals is not in conflict with established principles or any decision of this Court or a court of appeals. *See* Sup. Ct. Rule 10. Nor does this case present a question of public importance. *See id.*

The Court should not review a discretionary decision, by which the district court refused to depart from an established rule of law, based on specific facts and circumstances, including a procedural history not likely to be repeated; the issues raised by that decision are of interest only to these litigants and offer no potential for precedential effect. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) (noting that certiorari should not have been granted in cases in which "the question was of importance merely to the litigants and did not present an issue of immediate public importance"); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."); *see also United States v. Johnston*, 268

U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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